No. 15,998

United States Court of Appeals

For the Ninth Circuit

JAMES R. YOST,

Appellant,

vs.

ALBERTA G. MORROW,

Appellee.

APPELLEE'S BRIEF.

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STATEMENT OF THE CASE.

This was an action brought by appellant to foreclose a Chattel Mortgage executed by appellee and one C. A. Butcher, or, in the alternative, to obtain a judgment on a note secured by the Chattel Mortgage.

Appellee admitted execution of the note and mortgage in the Answer but evidence adduced at the trial indicated that the only reason for obtaining appellee's signature on the note and mortgage was the fact that she owned the land upon which the feed was grown and for no other reason. (R. 52, 60 and 61.) It further appears from the record that appellant did not, at any time, discuss any phase of the transaction with appellee and, more specifically, did not obtain appellee's permission to dissipate the feed which was the subject of the Chattel Mortgage. (R. 52, 60 and 61.)

At the close of the plaintiff's case a motion was made for dismissal of the action as to appellee on two grounds: (1) that no consideration passed to appellee, (2) that appellant permitted the security to be dissipated without the consent of appellee.

ARGUMENT.

I.

EVEN IF IT IS CONCEDED THAT, AS STATED IN APPELLANT'S BRIEF, THE LAW IN IDAHO AND IN EVERY OTHER JURISDICTION IS WELL SETTLED THAT WHERE A CONSIDERATION PASSES TO ONE CO-MAKER OF A PROMISSORY NOTE, SUCH CONSIDERATION IS SUFFICIENT TO SUPPORT THE OBLIGATION OF THE OTHER CO-MAKER, THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN FINDING THAT THERE WAS A LACK OF CONSIDERATION FOR THE PROMISSORY NOTE IN QUESTION AS TO APPELLEE MORROW AND IN DISMISSING THE CASE AS TO HER.

It seems to be the position of appellant that appellee should be held liable on the note as an accommodation maker. It is the position of appellee that she was not an accommodation maker as defined by the law in Idaho or elsewhere.

The Negotiable Instruments Law as adopted in Idaho reads as follows:

Section 27-206 Idaho Code—

> "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

On page 11 of appellant's brief the case of *Central Bank of Bingham v. Perkins,* 251 P. 627, 42 Idaho 310, is cited in support of appellant's position. This case defines an accommodation maker as follows:

> "* * * He was an accommodation maker; he signed the note without any consideration moving to himself *with the intention of lending his credit* to the promoters of the mine."

The key phrase in the above definitions is *"with the intention of lending his name (or credit)."* It is obvious from the testimony of both appellant (R. 52, 60 and 61) and appellee (R. 135, 136 and 137) that appellee was asked to sign the note and mortgage solely because she owned the land upon which the feed was stored and upon which the cattle were to be fed and appellant did not want her to run them off the land.

The testimony clearly shows that it was not the intention of any of the parties that appellee was being asked to lend her name or credit to Defendant Butcher.

II.

"THE TRIAL COURT MAY NOT DISREGARD POSITIVE UNCONTRADICTED EVIDENCE SUSCEPTIBLE OF CONTRADICTION BY AN AVAILABLE WITNESS."

Appellee heartily agrees with the above statement set forth on page 21 of appellant's brief. The evidence is positive and uncontradicted that appellee executed the note and mortgage. In fact, appellee, in her answer and in her testimony, admits the execution of the note and mortgage.

The evidence shows positively that the reason appellee signed both the note and mortgage was that she was the owner of the land and appellant wished to prevent appellee from running him off the land with his cattle during the performance of the feeding contract.

The Record at page 137 reads as follows:

> "The Court. They told you. Now, you own the property, and, in order to protect ourselves in the event you should decide to run us off the land, we would like your signature on it?
>
> A. Right."

The Record at page 52 reads as follows (testimony of James R. Yost):

> "Q. And did you discuss the making of this note and mortgage with her?
>
> A. No, sir, I did not. I merely requested her signature to be put on the note, if I——
>
> Q. You requested that of her personally?
>
> A. No, I did not. I asked Mr. Butcher.
>
> Q. And did you request Mr. Butcher to have that done because Mrs. Morrow owned the land?
>
> A. There wasn't sufficient security; I felt there wasn't sufficient security.
>
> Q. Just answer the question. Did you ask her to put that on there because she owned the land?
>
> A. Yes, I did."

Not only is the evidence of this fact positive and uncontradicted, appellant admits that it is true. Therefore, we submit that it was not the intention of any of the parties to the transaction that appellee was to be liable on the note as co-maker, joint maker, accommodation party or in any other capacity.

III.

Even if it is conceded, which it is not, that appellee were an accommodation party on the note, she was properly dismissed from the action on the grounds that the appellant released the security without appellee's consent.

Section 27-408, Idaho Code;
Section 27-801, Idaho Code;
Strother v. Wilkinson, 216 P. 436, 90 Okla. 247;
First National Bank v. Godwin, 47 P. 2d 116;
Goodman v. Goodman, 187 N.E. 777, 127 Ohio St. 223;
Tressler v. Whitsett, 12 S.W. 2d 723, 321 Mo. 849;
Rommel Bros. v. Clark, 74 S.W. 2d 933, 255 Ky. 554.

CONCLUSION.

We submit that by reason of the law and the evidence above set forth that the Honorable Trial Court committed no reversible error in entering a Judgment of Dismissal as to the Appellee Morrow. We ask that the Judgment of Dismissal be affirmed.

Dated, Boise, Idaho,
October 20, 1958.

Respectfully submitted,
WM. R. PADGETT,
Attorney for Appellee.